STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FT. MYERS REAL ESTATE HOLDINGS, LLC,

Petitioner,

vs. Case No. 11-1495

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice to all parties, the second portion of the final hearing in this bifurcated matter was conducted on June 17, 2013, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian Newman, Esquire
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.
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For Respondent: William E. Williams, Esquire
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STATEMENT OF THE ISSUE

This final hearing in this matter was previously bifurcated with several of the issues being heard in the first portion of the final hearing that was conducted on June 24-25, 2011. A Recommended Order was entered as to that portion of the hearing on August 22, 2011. A Final Order was entered on November 11, 2011, holding that Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), did not engage in undue or unreasonable delay in processing the application of Petitioner, Ft. Myers Real Estate Holding, LLC ("Ft. Myers"); did not repeatedly deny Ft. Myers' application for a quarter horse permit; and, did not deny Ft. Myers' petition for formal administrative hearing for the purpose of ensuring application of a new law that prohibited new quarter horse racing permits because of a geographical limitation. The Final Order was appealed to the Third District Court of Appeal, but the appeal was dismissed by the Court as not yet ripe for appeal pending resolution of the remaining issue.

The issue in the present portion of this case is whether the Division operated in bad faith vis-à-vis its processing and denial of Ft. Myers' quarter horse racing permit application.

PRELIMINARY STATEMENT

Ft. Myers filed an application seeking a quarter horse racing permit from the Division. The Division determined the

application failed to meet the statutory criteria for approval set forth in section 550.334(1), Florida Statutes (2008). The Division issued a notice denying Ft. Myers' application on January 13, 2009. Ft. Myers filed a petition seeking an administrative hearing contesting the denial of its application. The Division determined that the petition was non-compliant with Florida Administrative Code Rule 28-106.210(2), and it was dismissed with leave to amend. An amended petition was filed. The Division dismissed Ft. Myers' amended petition with prejudice based upon lack of standing. Ft. Myers successfully appealed the Division's denial of the amended petition. The petition was then remanded to the Division of Administrative Hearings to conduct a formal proceeding under section 120.57(1), Florida Statutes (2010).

The parties then sought an initial determination from the undersigned as to whether current law or the law in effect at the time of Ft. Myers' initial application for a permit would apply to this case. The proceeding was bifurcated to allow for a determination of that issue, based in large part on application of the exceptions from Lavernia v. Department of Professional Regulation, 616 So. 2d 53 (Fla. 1st DCA 1993), as set forth in Medsport Laboratory, Inc. v. Department of Agriculture & Consumer Services, Case No. 97-2508 (DOAH Dec. 17, 1997; DACS Jan. 21, 1998). The singular issue of bad faith addressed in Lavernia and

Medsport was not included in the first portion of the bifurcated final hearing, but was reserved for the present portion of the final hearing.

In the initial phase of the bifurcated hearing, Ft. Myers' Exhibits 1 through 44 and the Division's Exhibits 1 through 11 were admitted into evidence. Ft. Myers presented the testimony of David Romanik, David Roberts, Charles Collette, Joseph Helton, and Jim Barnes. The Division also called Helton and Barnes in its case-in-chief.

In the present phase of the bifurcated final hearing, Ft. Myers called two additional witnesses: John Lockwood, a gaming law attorney; and Jim Barnes, an investigator involved in the processing of Ft. Myers' application. No additional exhibits were offered into evidence by Ft. Myers. The Division did not call any witnesses, but offered Exhibits 1 and 2 which were admitted into evidence without objection. Exhibit 1 is the transcript of the initial phase of the bifurcated hearing from June 29-30, 2011; Exhibit 2 is the Final Order entered by the Division on November 10, 2011 (including the Recommended Order, Petitioner's exceptions to the Recommended Order, Respondent's response to Petitioner's exceptions, and the transcript of a motion hearing held on April 25, 2011).

A transcript of the second phase of the final hearing was ordered by the parties. The transcript was filed at the Division

of Administrative Hearings on July 8, 2013. By rule, the parties were allowed 10 days, i.e., up until July 18, 2013, to submit proposed recommended orders, but due to an issue regarding receipt of the transcript by one party, the parties requested and were granted an extension until July 23, 2013, to file their proposed recommended orders. Each party timely submitted a Proposed Recommended Order and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the evidence presented at both portions of the bifurcated final hearing, considered in toto, the following findings of fact are established.

1. Ft. Myers is a Florida limited liability company established for the purpose of obtaining a permit to own and operate a quarter horse racing facility in the State of Florida. It is further the intent of Ft. Myers to operate as a pari-mutuel wagering facility in any fashion allowed by law.

2. The Division is the state agency responsible for reviewing and approving applications for pari-mutuel wagering permits, including quarter horse racing facility permits.

3. In January 2009, Ft. Myers filed an application (the "Application") seeking a permit to build and operate a quarter horse racing facility in Lee County, Florida. The Application was properly filed with the Division.

4. On February, 13, 2009, the Division issued a deficiency letter setting forth several deficiencies or omissions in the Application.

5. Ft. Myers submitted a response to the deficiency letter on February 18, 2009. In the response, Ft. Myers addressed each of the deficiencies.

6. So far as can be determined from the evidence provided, the Application was deemed complete by the Division sometime after February 18, 2009. However, Ft. Myers thereafter contacted the Division and asked that further action on the Application be delayed. The basis for that request was that there were some "hostile bills" against quarter horse racing pending before the Legislature and there were pending issues concerning proposed gaming compacts with the Seminole Tribe of Florida.

7. Ft. Myers acknowledges that it requested delays in the review of the Application based upon business reasons.

8. In conjunction with amendments relating to the Indian Gaming Compact, on May 8, 2009, the Legislature enacted Chapter 2009-170, Laws of Florida (commonly referred to as SB 788), which authorized slot machine gaming for pari-mutuel permit holders located in Miami-Dade County. Chapter 2009-170 was filed with the Secretary of State and approved by the Governor on June 15, 2009, and states, in pertinent part:

Section 14. Section 550.334, Florida Statutes is amended to read:

550.334 Quarter horse racing; substitutions

(2) All other provisions of this chapter, including s. 550.054, apply to, govern, and control such racing, and the same must be conducted in compliance therewith.

* * *

Section 19. Subsections (4) and (7) of section 551.102, Florida Statutes, are amended to read:

551.102 Definitions.—As used in this chapter, the term:

(4) "Eligible facility" means any licensed pari-mutuel facility located in Miami-Dade County or Broward County . . .; <u>any licensed pari-mutuel facility located within a county as defined in s. 125.011, provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter</u>; . . .

* * *

Section 26. Sections 1 through 3 of this act and this section shall take effect upon becoming law. Sections 4 through 25 shall take effect only if the Governor and an authorized representative of the Seminole Tribe of Florida execute an Indian Gaming Compact pursuant

> to the Indian Gaming Regulatory Act of 1988 and requirements of this act, only if the compact is ratified by the Legislature, and only if the compact is approved or deemed approved, and not voided pursuant to the terms of this act, by the Department of the Interior, and such sections take effect on the date that the approved compact is published in the Federal Register.

9. Section 14 of the legislation essentially applied a provision to quarter horse racing facilities that already applied to other pari-mutuel facilities, i.e., no new facility could be approved for a site within 100 miles of an existing pari-mutuel facility. There is no site in Florida that would be more than 100 miles from an already existing pari-mutuel facility.

10. The effective date of this legislation, as evidenced in section 26, was conditioned on the execution and approval of the gaming compacts between the State of Florida and the Seminole Tribe of Florida.

11. The compacts were subsequently executed by the Governor and the Seminole Tribe of Florida on August 28, 2009, and August 31, 2009; however, they were not ratified by the Legislature, and, thus, they were specifically rendered void as was the remainder of Chapter 2009-170. (It was not until chapter 2010-29 was enacted and became law, effective July 1, 2010, that the third compact entered into by the Governor and the Seminole

Tribe of Florida on April 7, 2010, went into effect. Thus, the statutory amendment allowing slot machines at quarter horse and other pari-mutuel facilities went into effect at the same time as the provision subjecting quarter horse racing permits to the 100-mile distance requirement as set forth in section 550.334.)

Background Information (The Players)

12. Hartman and Tyner, d/b/a Mardi Gras Casino ("Hartman and Tyner"), Calder Casino and Race Course ("Calder"), and the Flagler Magic City Casino ("Flagler") are part of a coalition of South Florida pari-mutuel permitholders (collectively referred to as the "South Florida permitholders") that opposed the expansion of quarter horse racing into Miami-Dade County.

13. Jim Greer, then chairman of the Republican Party of Florida, was a contract lobbyist for Hartman and Tyner. In May 2008, Greer entered into a two-year contract with Hartman and Tyner that paid him $7,500 per month as a lobbyist.

14. Charles "Chuck" Drago was the secretary of the Department of Business and Professional Regulation (the "Department"). Drago was a close friend of Greer. Drago had been the chief of police of Oveido where Mr. Greer had lived and served on the City Commission. Greer and Drago had been fundraisers for Governor Crist.

15. Scott Ross was hired by the Department as a deputy secretary in April 2009, just months after Ft. Myers' initial

application was filed. Ross was hired with assistance from Delmar Johnson, Ross' college friend, who held the position of executive director of the Republican Party of Florida. Johnson worked for Greer. Ross' responsibility included oversight of the Division.

16. David "Dave" Roberts was the director of the Division for approximately eight years. Roberts was division director when a number of quarter horse permit applications were filed with the Division after the 2007 changes in the card room law, which allowed quarter horse racing facilities to have card games. Roberts caused the Division to develop guidelines to govern the review of the quarter horse applications. After Roberts was forced to resign, the Division modified the guidelines to require applicants to show that zoning was in place for racing before the permit was issued.

17. Milton "Milt" Champion was named director of the Division, effective January 4, 2010. He signed the denial of Ft. Myers' quarter horse permits on January 12, 2010, after he had been on the job for only eight days.

18. Joseph Helton is an attorney employed by the Division and has served as chief legal counsel to the Division since 2002. Helton has worked as an attorney for the Division for a combined 13 to 14 years. Helton was designated by the Division as its agency representative in this proceeding.

19. Earnest James "Jim" Barnes is employed by the Division as an Investigative Specialist II. Barnes' duties with the Division include the evaluation of applications for quarter horse permits. Barnes was involved in the processing of all quarter horse permit applications.

20. John Lockwood is an attorney who represents gaming clients in this State. Some of his clients own pari-mutuel facilities in the Miami-Dade County area.

The Roberts Regime

21. While he was director of the Division, Roberts made all of the decisions on whether to grant or deny a pari-mutuel permit. Neither the secretary nor the deputy secretary made any decisions on quarter horse applications during Roberts' tenure as director of the Division.

22. According to Roberts, the Division developed guidelines in 2007 to aid in the review of all quarter horse applications after the first of several new applications for quarter horse permits were filed. Roberts explained that the Division had no rules implementing the statutory criteria in 2007 because there had not been any quarter horse applications filed with the Division for a long time.

23. The guidelines for review of quarter horse applications developed under Roberts did not require the applicant to demonstrate that the property was zoned for a racetrack before

the permit was issued. The Division interpreted the statutory "location is available for use" criterion to mean that racetrack zoning was "possible to obtain." Roberts noted that another pari-mutuel statute, section 550.055(2), specifically required the applicant for permit relocation to demonstrate that the location is zoned for racing before the Division issued a permit. In contrast, section 550.334 does not specifically require the applicant to demonstrate that racetrack zoning is in place.

24. During Roberts' directorship, the Division would accept a letter from a land use attorney familiar with zoning in the area where the racetrack would be located describing the process by which proper zoning could be obtained as adequate evidence that zoning was obtainable. Consistent with this guideline, deficiency letters issued by the Division under Roberts requested applicants to provide an opinion from an attorney and from a local government official stating that proper zoning for the proposed location was "obtainable."

25. The guidelines for review of quarter horse applications developed under Roberts did not require the applicant to own the land at the time the permit was issued. Rather, the applicant was required to give reasonable assurances that the property was under the control of the applicant by written agreement. The applicant typically satisfied this guideline by submitting a lease or contract for purchase along with the application. Some

contracts might include a contingency or condition precedent. For example, the real estate contract in the Gretna Racing, LLC, application listed a number of contingencies that must be met.

26. Roberts received numerous complaints from existing pari-mutuel permitholders (including, in particular, representatives of Hartman and Tyner) about the manner in which the Division was granting quarter horse permits. Ross also made it known to Roberts that he was not in favor of granting quarter horse permits. Roberts, however, believed that he was required to do what the letter of the statute dictated.

27. According to Hartman and Tyner's attorney, John Lockwood, the "special interests" wanted Roberts terminated, because they were concerned with the quarter horse application review process. Lockwood had heard complaints from his clients that Roberts gave out quarter horse permits "like candy."

28. Lockwood made his client's concerns about Roberts' interpretation of the quarter horse statute known to Ross. Later, Jim Greer, then a contract lobbyist for Hartman and Tyner, called Ross and asked him to fire Roberts.

29. Ross met with Roberts and gave him the option of termination or resignation on July 16, 2009, within one week after Greer asked him to terminate Roberts. Roberts was not given a reason for his termination. During the time this was

going on, Ft. Myers' amended application (dated July 27, 2009) was filed with the Division.

The Ross Regime

30. Joe Dillmore became the interim director of the Division after Roberts was forced to resign. However, according to Dillmore, Ross was the person in charge of all quarter horse permit applications after Roberts left. Ross told Dillmore that he wanted to be informed on decisions at every level of the quarter horse application process. Ross made it known to Dillmore that he believed the 100-mile restriction placed on other pari-mutuel permitholders should also be applied to quarter horse permit applications, even though the quarter horse statute did not impose a location restriction at that time. Ross opposed quarter horse racing because of the Governor's opposition to gambling in general.

31. According to Barnes, Ross wanted to be kept apprised of his actions on pending quarter horse permits, including deficiency letters, and any recommendation for approval or denial. Previously, Barnes had never been required to report his daily activities to a deputy secretary.

32. On August 11, 2009, approximately three weeks after Roberts was forced to resign, there was a meeting held at the Calder Race Track in Miami between existing pari-mutuel permitholders and key agency personnel. The attendees of this

meeting included representatives of Hartman and Tyner, Calder, and Flagler, the three loudest voices in opposition to the expansion of quarter horse gaming into Miami-Dade County. The agency was represented at the Calder meeting by Secretary Drago, Deputy Secretary Ross, and attorney Helton.

33. One topic of the Calder meeting was the competitive impact of new quarter horse permits on existing permitholders. In particular, the South Florida permitholders made it very clear at this meeting that they opposed the issuance of any quarter horse permits in Miami-Dade County.

34. The existing pari-mutuel permitholders at the Calder meeting argued that the Division should require quarter horse applicants to demonstrate that the proposed location for the permit was zoned for a racetrack before the permit was issued. This interpretation had been advanced in legal challenges filed by existing permitholders (including Hartman and Tyner) before the Calder meeting. However, these legal challenges failed to achieve the desired result before the Calder meeting.

35. It was on August 12, 2009, the day after the Calder meeting, that Ft. Myers filed its amended application ("Amended Application") changing the proposed location of its facility to Miami-Dade County. Lockwood found out about the Amended Application within days and called Barnes to express his client's extreme displeasure with Ft. Myers' intent to operate in the

Miami area. Barnes sent an email to Helton on August 19, 2009, relaying the call from Lockwood stating "don't know what that means in the long run."

36. There was a meeting held in Tallahassee within days of this email between attorneys for the South Florida permitholders (including Lockwood) and attorneys for the Division (including Helton), so the permitholders could express their concerns with the quarter horse review process with Division counsel in person.

37. Attorney Lockwood made it a point to follow the progress of applicants for quarter horse racing permits on behalf of his clients. Such applicants could often be direct competitors of his clients and, in the case of Ft. Myers, could have an adverse impact on his clients' businesses if approved.

38. When Ft. Myers later made a decision to relocate its proposed quarter horse racing facility from Lee County to Dade County, Lockwood began to intensely study Ft. Myers' proposal. He asked for and received a copy of Ft. Myers' application from the Division. He carefully studied the application content and sought possible flaws therein. (This would necessarily have occurred after the aforementioned meetings at Calder Race Track and at the Division's office in Tallahassee.)

39. Lockwood had been in attendance at the Calder Race Track meeting. The private attendees at the meeting complained to the Division employees that the process for approving quarter

horse racing permits was too lax, i.e., that it was too easy under the current policies to obtain a permit. It was suggested to the Division that more stringent requirements be put into place. One suggestion was that rather than accept a letter from the applicant's attorney that their proposed site could be properly zoned for quarter horse racing, the Division should require zoning to be in place at the time of the application.

40. Lockwood also personally, through emails, phone calls or visits, contacted Division employees to lobby for stricter standards for quarter horse racing applications. When Ft. Myers first changed its location to Dade County, Lockwood contacted Jim Barnes to express his adamant opposition to such a change. Lockwood then visited Division attorney Helton and others in Tallahassee to express his concerns. He called Deputy Secretary Ross as well. In short, Lockwood talked to everyone he thought might prevent Ft. Myers' application from being approved. Such actions were consistent with Lockwood's normal lobbying efforts for his clients on numerous other projects; they were not taken against Ft. Myers individually, but against all competitors of his clients.

The Amended Application

41. In consideration of SB 788 and due to business negotiations with another permit holder in Lee County, Ft. Myers amended its application. The Amended Application was dated

July 27, 2009, and filed with the Division on August 12, 2009 (six months after filing its original application and one day after the Calder meeting), Ft. Myers made the following changes to its initial proposal:

- Changes were supposedly made to the ownership interest of the project (although no evidence of such changes were ever presented at final hearing);

- A revised business plan, revised financial projections for year one of operations, and a revised internal organizational chart were included;

- The proposed site plan was amended to reflect the move to Florida City; and

- A new construction time line was submitted.

42. Meanwhile, several other entities had submitted applications seeking to construct and operate quarter horse racing facilities in different venues around the state. Quarter horse permits were ultimately issued to ELH Jefferson, LLC ("ELH Jefferson"); Gretna Racing, LLC; Debary Real Estate Holdings, LLC ("Debary"); and South Marion Real Estate Holdings, LLC, between November 2008 and May 2009. Those approvals were, in part, based on written assurances from land use attorneys that zoning and other land use approvals (necessary elements for permit approval) could be obtained after permit issuance.

43. After the Calder meeting, the Division had decided to require more from applicants to meet the statutory criteria for

issuance of a permit under section 550.334, Florida Statutes. They noted that although nine quarter horse permits were issued from September 2008 until February 2010, no quarter horse racing permit holder without an existing facility at the time of permit issuance had actually utilized a permit to conduct quarter horse racing. One project, Debary, failed to obtain necessary land use approval after permit issuance, notwithstanding land use attorney opinions that it was obtainable. Debary was the only one of 18 quarter horse permit applications submitted between 2007 and 2010 not to obtain zoning approval.

44. The Division continued to consider whether it needed more evidence that the land was "available for use" than simple opinions from land use attorneys. The Division's stated basis for its re-appraisal of this issue began when it reviewed the Miami-Dade Airport's application for a quarter horse permit, which wrongly asserted that the entire airport property was available for use as a quarter horse facility. Ultimately there were no zoning issues associated with the Miami-Dade Airport application, however.

45. Ft. Myers filed the Amended Application just as the Division was changing its interpretation of what the statute required regarding zoning. In response to the Amended Application, the Division sent Ft. Myers a deficiency letter

dated September 11, 2009. That letter set out the following pertinent deficiency items:

> Deficiency #1 That the location(s) where the permit will be used be "available for use." That because previous quarter horse applications have provided opinion letters from land use experts, and those sites have later proven not be to usable [sic] for the quarter horse facility, more specific information was required, i.e., The qualifications of the applicant's zoning attorney; A written statement of the attorney's grounds forming his opinion; and A copy of any application for rezoning filed with the City of Florida City, including an update from the City on the status of the application.
>
> Deficiency #2 That the location(s) where the permit will be used be "available for use." That the Letter of Intent provided by Ft. Myers is insufficient and that documentation reflecting its control over the property is required, i.e., a purchase agreement. The Division also asks for information regarding Ft. Myers' relationship with the registered owner of the site in question.
>
> Deficiency #4 That reasonable supporting evidence be provided that "substantial construction will be started within 1 year" after issuance of the permit.

46. After a deficiency letter was sent to Ft. Myers by the Division concerning the shortcomings of the amended application, Ft. Myers responded with additional information. After the Division had received the responses from Ft. Myers, but before a final letter of denial had been issued, Lockwood met with Deputy Secretary Ross. Ross informed Lockwood that "the [Ft. Myers]

application was not capable of being approved" or some language to that effect. The reason Ross provided was there was no current zoning for the site and the purchase contract had a contingency in it that made ultimate purchase of the site less than certain. Lockwood, who had lobbied for the zoning requirement and had pointed out to Division employees the contingency in the contract, agreed with Ross' stated bases for intending to deny the application. Absent testimony from Ross, it is impossible to ascertain his intention in making a statement to Lockwood (and whether it was as Lockwood remembered or something else). There is no mention of the meeting in Ross' deposition transcript which was entered into evidence in this proceeding.

47. On November 11, 2009, Ft. Myers responded to the Dade County deficiency letter. In its response, Ft. Myers provided the Division the following information:

- Information about its land use attorney, Jerry B. Proctor, from the law firm Bilzin Sumberg.

- A letter dated September 18, 2009, from Henry Iier, City Planner for the City of Florida City. The letter indicates that the City has zoning jurisdiction over the subject property and that it allows applications for zoning changes. Iier also states that the timetable for rezoning appears reasonable.

- An Agreement for Purchase and Sale between Ft. Myers and an entity called Florida City 70 Acres, LLC. The agreement includes a

> contingency provision requiring implementation of certain provision of SB 788 passed by the 2009 Legislature. Fulfillment of those provisions was a condition precedent to Ft. Myers' commitment to purchase the property.

48. The Division accepted Ft. Myers' response as submitted. At the time of the response, David Romanik, a principal of and legal counsel to Ft. Myers, contacted Barnes to make sure that, as was customary, he would be notified if there were any "approval stoppers" (i.e., missing information that would cause the application to be denied). By email dated November 18, 2009, Barnes told Romanik,

> "The Division received your response to our Sept 11, 2009, deficiency letter regarding the Ft. Myers Real Estate Holdings, LLC quarter horse permit application. I will review the response and will contact you if I have any further questions."

49. However, instead of contacting Romanik when approval stoppers were found, Barnes was told by his superiors to simply issue a letter denying the permit. The grounds for the denial were:

> 1) The application fails to demonstrate that the land is available for use; and
>
> 2) The application fails to provide reasonable supporting evidence that substantial construction of a quarter horse facility would be commenced within one year of the issuance of the permit, because the applicant does not currently own the land and the "Agreement of Purchase and Sale" included in the application is contingent upon

implementation of certain provisions of HB 788.

50. Although there was no mention of it in the denial letter, the Division found the contingency in the Purchase and Sale Agreement to be a significant impediment to commencement of construction within one year.

51. Sometime during the month of December 2009, personnel from the Division contacted another quarter horse permit applicant, North Florida Racing, concerning its pending application. The Division employee advised North Florida Racing that there had been a change in "policy" at the Division concerning one aspect of the application review. Specifically, North Florida Racing was advised that its selected site would have to be proven to be "land available for use" as a quarter horse facility. They were told that the old standard of having a local zoning lawyer's opinion letter would not suffice. Rather, the applicant must show that an application for rezoning had actually been filed. It is not clear from the evidence whether North Florida Racing contacted the Division or whether the Division initiated that contact. Other than the statements in the deficiency letter, Ft. Myers was not directly contacted by anyone from the Division concerning this change in policy, despite the promise Barnes made to Romanik to let him know if he had any further questions.

52. Instead, on January 12, 2010, almost exactly one year after the Application had been filed, the Division issued a letter denying Ft. Myers' Amended Application for a quarter horse racing permit in Miami-Dade County, Florida. The denial letter contained a statement concerning the process for requesting an administrative hearing on the matter.

53. It was the Division's normal practice to provide applicants with deficiency letters so that applicants could be fully aware of any shortcomings in their applications and be given an opportunity to correct the deficiencies.[1/] It was not uncommon for the Division to issue two or more deficiency letters to an applicant, though there is no requirement or policy for more than one such letter. In the present case, Ft. Myers received a deficiency letter relating to its Lee County site and then received another one when the site was changed to Miami-Dade County. After Ft. Myers responded to the deficiency letter for the Amended Application, it reasonably expected the issuance of a further deficiency letter if there were remaining deficiencies. Although no additional letter was required, Ft. Myers believed one would be issued if there were further deficiencies, especially after Barnes' email to Romanik.

54. The Division did not issue a second deficiency letter for the Amended Application. The Division's rationale was that the first letter was clear and unambiguous and if Ft. Myers did

not respond appropriately, then the deficiencies must not be correctable. No one from the Division provided credible explanation for why it did not follow the traditional process, the one followed with other applicants at around the same time.

55. It is the position of Ft. Myers that the Division imposed unauthorized requirements on Ft. Myers' application so that it could use the new law which was about to come into effect, that the Division imposed non-rule policy on Ft. Myers to delay processing of the application, and that the Division unreasonably and improperly delayed Ft. Myers' application in order to take advantage of the change in the law.

56. Two other quarter horse permit applications were pending at the same time the Application was under review at the agency: Hamilton Downs II and North Florida Racing. Hamilton Downs received its permit on February 4, 2010; North Florida Racing received its permit on March 26, 2010.

57. Counsel for North Florida Racing remembers being told by Mr. Helton at the Division about changes to the Division's interpretation concerning the need for zoning approval. Division counsel sent an email which says in part: "The powers that be seem to be shifting their interpretation of the statutes and rules to require that zoning for the track must be in place before a QH permit can be issued." Thereafter, North Florida Racing changed locations to a location zoned for quarter horse

racing, and its permit was ultimately issued. It is unclear from the record whether Helton actually made the quoted statement, and, if so, in what context it was made. Helton could not remember the statement, but does not deny that it could have been made.

58. As to the Hamilton Downs II location, neither of the two deficiency letters issued in that filing stated that the property had to be zoned for quarter horse racing. On November 4, 2009, Hamilton Downs provided the Division with a letter from the Town Council of Jennings stating it would support a zoning change at the proposed site to allow for quarter horse racing and that the zoning could be accomplished within six months. Thereafter, on December 14, 2009, Hamilton Downs submitted a letter from Hamilton County, Florida, stating the proposed site is, in fact, presently zoned for quarter horse racing. There is no credible evidence as to what precipitated Hamilton Downs' sending the Division that letter.

The Petitions Requesting Administrative Hearings

59. After receiving the denial letter from the Division, Ft. Myers prepared a Petition for Formal Administrative Hearing which it filed on January 29, 2010. On February 16, 2010, the Division rejected the Petition on the basis that it failed to identify disputed issues of material fact. Ft. Myers was given

leave to amend its Petition within 21 days, i.e., on or before March 8, 2010.

60. Ft. Myers filed its Amended Petition for Formal Administrative Hearing exactly 21 days later, i.e., on March 8, 2010. The Amended Petition was also rejected by the Division, this time on the basis that Ft. Myers (the denied applicant) did not have standing to challenge the denial of its own application. The final order of dismissal is dated March 23, 2010. The Division's rationale for the denial -- developed by its attorney, Chip Collette -- was that inasmuch as the SB 788 provisions could not come into effect and those provisions were a condition precedent to Ft. Myers' purchase agreement for property, Ft. Myers could not move forward on their Amended Application and, thus, did not have standing in an administrative challenge. Mr. Collette, a long-time expert in administrative law, did not provide a credible explanation for this obviously flawed position. At about the time he created this strained position on standing, Collette advised Lockwood that the Amended Petition filed by Ft. Myers was not likely to get an administrative hearing.

61. The rejection of Ft. Myers' Amended Petition was appealed to the First District Court of Appeal. In an opinion dated February 7, 2011, that court -- in strong language -- reversed the Division's dismissal of the Amended Petition. The

Court remanded the case to the Division with directions to refer the case to the Division of Administrative Hearings. Attorneys' fees were also awarded to Ft. Myers.

62. Meanwhile, the Division was already discussing the impact of the legislation that was about to become law. At a meeting on March 23, 2010, Division employees were discussing the impending dismissal of Ft. Myers' amended Petition for Formal Administrative Hearing. At that meeting, it was suggested that even if Ft. Myers were to appeal, the impending law would be in effect, thereby mooting Ft. Myers' application.

63. The new law became effective July 1, 2010. The new law contained the 100-mile geographical restriction mentioned above. There is not any location in Florida that would qualify for a new pari-mutuel facility under that limitation.

64. There are several reasons the application(s) filed by Ft. Myers were not processed more quickly: Ft. Myers asked that no further action be taken at one point. Ft. Myers amended its application, necessitating additional review by the Division. The petitions for formal administrative hearing were rejected. The first petition had been filed 17 days after notice of denial, the second one 21 days after dismissal. If the original Petition filed by Ft. Myers on January 29, 2010, had been accepted by the Division, it is possible a final order could have been entered sometime between June 17 and July 26, 2010, had the case

proceeded at a normal pace. Thus, it is possible the final order could have been entered prior to the new 100-mile limitation taking effect on July 1, 2010.

65. By denying the amended Petition and further delaying any ultimate decision on Ft. Myers' application, the Division was fairly certain that the application could never be approved.

CONCLUSIONS OF LAW

66. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

67. Ft. Myers, as the party asserting the affirmative of the issue in this proceeding, has the burden of proof. See Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) (citing Dep't of Agric. & Consumer Servs. v. Strickland, 262 So. 2d 893 (Fla. 1st DCA 1972)).

68. At the time Ft. Myers' application for a quarter horse racing permit was filed, the pertinent portion of section 550.334, Florida Statutes (2008), stated as follows:

> (4) Section 550.054 is inapplicable to quarter horse racing as permitted under this section. All other provisions of this chapter apply to, govern, and control such racing, and the same must be conducted in compliance therewith.

69. While Ft. Myers' application was pending at the Division, section 550.334 was amended to read:

> (2) All other provisions of this chapter, including s. 550.054, apply to, govern, and control such racing, and the same must be conducted in compliance therewith.

70. The reference to section 550.054, Florida Statutes, specifically relates to subsection (2) of that statute which states, "[a]n application may not be considered, nor may a permit be issued by the division or be voted upon in any county, to conduct horseraces, harness horse races, or dograces at a location within 100 miles of an existing pari-mutuel facility . . . ." Under the amended version of section 550.334, Ft. Myers' application could not be approved because there is not any location within the State that would satisfy the 100-mile limitation.

71. Courts generally state that, absent explicit guidance from the Legislature, remedial changes to licensing laws are applied retroactively, but substantive changes are not. Florida follows the general rule that a change in the licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted. Lavernia, 616

at 52-54 (citing Bruner v. Board of Real Estate, Dep't of Licenses and Permits, 399 So. 2d 4 (Fla. 5th DCA 1981)).

72. However, there are exceptions to the general rule. In Medsport Laboratories, Inc., d/b/a Fitness USA v. Dep't of Agric. & Consumer Servs., No. 97-2508 (DOAH Dec. 17, 1997; DACS Jan. 21, 1998), the exceptions to Lavernia are discussed. The exceptions discussed therein that are relevant to this case are as follows:

- Unreasonable delays, i.e., when the reviewing agency unreasonably delays acting upon an application until the amended statute becomes effective. Attwood v. State, 53 So. 2d 101 (Fla. 1951).

- Applying improper statute, i.e., when the reviewing agency seeks to apply the amended statute during appeal when it had applied the prior statute when making its initial decision. Dep't of HRS v. Petty-Eifert, 443 So. 2d 266 (Fla. 1st DCA 1983).

- Repeated denial, i.e., when the reviewing agency repeatedly denies an application and the law changes while the application is pending. Goldstein v. Sweeny, 42 So. 2d 367 (Fla. 1949).

73. The application at issue was not repeatedly denied pending a change in the law. The Division did not seek to apply one version of the statute prior to appeal and another after.

74. Though there were apparent inconsistencies between the way Ft. Myers' application was processed as compared to some other applicants, it cannot be said that the Division "unreasonably delayed" the review process. At worst, the action

taken on Ft. Myers' amended application, dismissing it on clearly fallacious reasoning, does not pass the smell test. But it seems the Division could have "delayed" Ft. Myers' application by asking for more information after the deficiency letter -- which it did not do.

75. The issue, then, is whether there was bad faith on the part of the Division concerning its review and processing of Ft. Myers' application.

76. "Bad faith" is defined in Black's Law Dictionary as:

> The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

77. In Espirito Santo Bank v. Agronomics Financial Corp., 591 So. 2d 1078 (Fla. 3d DCA 1991), the Court addressed "bad faith" in a commercial banking situation. There, the Court held, "[A] finding of bad faith must be based upon the bank's subjective state of mind, Sienfield v. Commercial Bank & Trust Co., 405 So. 2d 1039 (Fla. 3d DCA 1981), and is not equated with lack of commercial reasonableness." In the instant action, the

Division's state of mind is not clear. Although some of its actions vis-à-vis Ft. Myers are not consistent with how some other applicants were treated, the Division did not appear to specifically delay the processing of the application.

78. In Margate v. Amoco Oil Co., 546 So. 2d 1091 (Fla. 4th DCA 1989), the City of Margate was found to have acted in bad faith. In that case, the City intentionally and blatantly delayed the processing of Amoco's application for a permit while the City enacted new ordinances which would prohibit such a permit. In the instant action, the Division had no power or authority to enact SB 788. The Division did seem intent on limiting some new quarter horse racing permits, but it seemed to follow its general policies (though some of those policies changed during the pendency of the application).

79. Bad faith was found by the Court in Dade County v. Jason, 278 So. 2d 311 (Fla. 3rd DCA 1973). In that case, a county clerk intentionally withheld issuance of a permit for thirty minutes so that a moratorium imposed by the county could go into effect. The applicants had satisfied all requirements for the permit they were seeking but a clerk did not issue the permit as he should have, waiting just long enough to make the permit non-issuable under the new moratorium. In the present case, even if it was the Division's intent not to approve new permits, there is no evidence Ft. Myers already satisfied all the

requirements for issuance of a quarter horse racing permit. By failing to provide all the information requested in the second deficiency letter, Ft. Myers' application could be deemed deficient.

80. In each of the cases cited above, the governmental entity was clearly (almost blatantly) delaying the application process so it could create and apply a new legal requirement. The present case is distinguishable because: 1) there is no clear intent to delay the application process; and 2) the Division was not in control of the new legal standard that was to be imposed.

81. In Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F. 3d 1320 (11th Cir. 2004), the court set forth three elements which must be proven in order to establish bad faith on the part of a governmental entity, to wit: 1) The applicant was entitled to the permit for which it applied at the time its application was complete; 2) The agency unreasonably delayed action or denied the permit to gain time to change the applicable law; and 3) The agency subsequently conceived and enacted a law to prevent issuance of the permit.

82. The Coral Springs decision does not directly apply to this case because the Division cannot "change the applicable law." However, let us presume the holding in Coral Springs meant to imply that a state agency could act in bad faith while waiting for the Legislature to change applicable law. One element of the

decision is that the applicant must be entitled to a permit at the time its application was complete. The Ft. Myers application did not provide assurance that the intended site was zoned for quarter horse racing. It did not prove that substantial construction could be commenced within one year of issuance. Thus, Ft. Myers was not -- at that time -- entitled to the requested permit.

83. Ft. Myers' own actions in seeking delays in the processing of its application militate against the suggestion that the Division delayed the process in order to allow for a Legislative enactment to become law. Ft. Myers asked that action on its application be delayed at one point, and it changed the proposed location of its facility from one coast of Florida to the other, necessitating additional review by the Division. Neither the Division nor Ft. Myers could predict when the proposed changes would take effect -- or whether they would take effect at all. Thus, no matter what the Division's rationale or motivation concerning the handling of Ft. Myers' application, the evidence does not show that there was a bad faith purpose based on an intention to assure the new law would apply.

The Deficiency Notice

84. Because Ft. Myers raised the issue at final hearing and in its Proposed Recommended Order, a discussion of the deficiency letter is appropriate.

85. The Division issued only one deficiency letter to Ft. Myers. That letter included -- in deficiency number two -- a statement concerning the proposed site of the facility. The letter said, "[D]ocumentation reflecting [Ft. Myers'] control over the property is required, i.e., a purchase agreement." The letter of intent concerning the property submitted by Ft. Myers' in its Amended Application had been deemed insufficient by the Division. Ft. Myers, in response, provided an Agreement for Purchase and Sale for the property. It, however, contained a contingency requiring implementation of certain provisions in SB 788 passed by the 2009 Legislature.

86. The denial letter set forth two reasons relied upon by the Division for denying Ft. Myers' application: (1) That the land wasn't available for use; and (2) That commencement of construction could not occur within one year because the [Ft. Myers] did not currently own the land. Mere ownership of the land itself was not stated as a basis for denial; rather, failure to own the land would prevent commencement of construction within one year.

87. It is necessary for a state agency to specifically identify "deficiencies or omissions failure of which to correct would result in denial of the application." See dissent by Judge Nimmons in Doheny v. Grove Isle, Ltd., 442 So. 2d 966, 975 (Fla. 1st DCA 1983). See also section 120.60(1), Florida Statutes

(2009). In this case, the Division sufficiently identified the deficiencies which needed to be addressed.

88. The Division could have (and in the past had) issued another deficiency letter asking Ft. Myers to address the contingency in its purchase agreement. Barnes could have called Romanik and told him the purchase agreement/land ownership issue was an approval stopper. But there is no legal requirement that the Division (or Barnes) do so. Failure to do so, though not the best way to treat citizens of this State, is neither a violation of the law nor an act of bad faith.

89. Ft. Myers contends the change in the Division's interpretation of statute concerning zoning requirements constitutes an unadopted rule. Inasmuch as the recommendation in this Recommended Order is that the current version of section 550.054(2), Florida Statutes, applies, it is not necessary to consider that argument. However, even if the zoning element of Ft. Myers' application were not considered, the failure to have a non-contingent purchase agreement in place would be sufficient basis for denying the application.

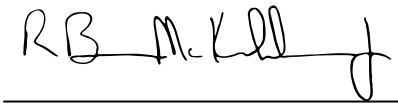
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department of Business and Professional Regulation finding the absence of

any bad faith on the part of the Division, and declaring that the 2010 version of section 550.334, Florida Statutes, applies to the application filed by Ft. Myers Real Estate Holdings, LLC, for a quarter horse racing permit.

DONE AND ENTERED this 6th day of August, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of August, 2013.

ENDNOTE

[1/] It was, in fact, required by law. § 120.60(1), Fla. Stat. (2009)

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.